STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE WAYNE COUNTY CIRCUIT COURT
Hon. Kathleen MacDonald

CHARTER TOWNSHIP OF NORTHVILLE,
a Michigan charter township,

Plaintiff-Appellant,

and

HEATHER SCHULZ and JEFFREY SCHULZ; MARY LOWE and GEORGE LOWE; ERIC HANPETER and LAURA HANPETER; FRANK CORONA and MARCELLA CORONA; DAVID MALMIN and LEE ANN MALMIN; JOHN MILLER and DEBRA MILLER; TOM CONWELL and EVY CONWELL; MARY BETH YAKIMA and DAN YAKIMA; RICHARD LEE and PATTY LEE; BETH PETERSON and RICK PETERSON; LARRY GREGORY and NANCY GREGORY; K. MAUREEN WYNALEK and JAMES WYNALEK; HAROLD W. BULGER and SANDRA A. BULGER,

Intervening Plaintiffs-Appellants,

v.

NORTHVILLE PUBLIC SCHOOLS,
a Michigan municipal corporation;
LEONARD R. REZMIERSKI, Superintendent
of Northville Public Schools; and the
BOARD OF EDUCATION OF NORTHVILLE
PUBLIC SCHOOLS,

Defendants - Appellees.

/

Supreme Court Case No. 120213

Court of Appeals No. 219124
Circuit Court Case
No. 98-816747 CZ

ORAL ARGUMENT REQUESTED

INTERVENING PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

SUSAN K. FRIEDLAENDER (P41873)
HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Intervening Plaintiffs/Appellants
32270 Telegraph Road, Suite 225
Bingham Farms, MI 48025-2457
(248) 566-8448

TABLE OF CONTENTS

STATEMENT OF JUDGMENT APPEALED FROM iv

QUESTIONS PRESENTED v

INTRODUCTION 1

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS 2

STANDARD OF REVIEW 6

ARGUMENT 7

I. THE COURT OF APPEALS CLEARLY ERRED IN ITS CONSTRUCTION OF THE REVISED SCHOOL CODE AS THE LEGISLATURE HAS EVIDENCED NO INTENT TO IMMUNIZE SCHOOL DISTRICTS FROM ADHERING TO LAND DEVELOPMENTCONTROLS MEANT TO INSURE APPROPRIATE LAND USE RELATIONSHIPS, AVOID THE INTERFERENCE WITH THE USE AND ENJOYMENT OF ADJACENT PROPERTY AND PROTECT PUBLIC HEALTH, SAFETY AND WELFARE 7

A. Neither The Township Zoning Act Nor The Township Planning Act Evidence An Intent To Immunize School Development From Appropriate Land Use Regulation But Instead Authorize Townships To Plan And Zone For School Uses 9

B. The CSBA Has Not Replaced Local Control Over The Development Of School Sites But Only Local Control Over The Construction Of School Buildings 12

C. The Revised School Code Read Together With The TZA, TPA and CSBA or Read Alone Has Not Displaced Local Land Development Regulation Of School Sites 15

D. A Proper Construction Of §1263(3) Does Not Support The Court's Conclusion That The Legislature Has Evidenced An Intent To Exempt Schools From All Zoning Regulations ..27

E. The Court Of Appeal's Mistaken Reading Of §1263(3) Leads To The Absurd And Prejudicial Result That School Districts Need Not Adhere To Any Land Use Regulations Meant To Protect Public Health Safety And Welfare In The Development Of School Sites 28

1. It Is Absurd And Detrimental To The Public Good To Conclude That The Legislature By Its Failure To Include Site Design Standards In §1263(3) Meant To Exempt Schools From Any Land Use Regulation 30

2. Interpreting §1263(3) To Exempt Schools From All Land Use Regulation Would Violate The Due Process Rights Of Other Property Owners..... 33

II. THE LACK OF ANY STANDARDS TO GUIDE THE SUPERINTENDENT'S DISCRETION TO REVIEW AND APPROVE SITE PLANS CONSTITUTES AN UNCONSTITUTIONAL AND UNLAWFUL DELEGATION OF LEGISLATIVE POWER 38

CONCLUSION 42

RELIEF REQUESTED 43

INDEX OF AUTHORITIES

Cases

Board of Education v Owosso, 208 Mich 646; 175 NW 1009 (1920) 18
Burt Township v. Department of Natural Resources, 459 Mich 659; 593 NW2d, 537 (1999) 8, 9, 12
Byrne v. State, 463 Mich 652, 624 NW2d 906 (2001) 16, 36
Capital Region Airport Authority v Charter Township of De Witt, 236 Mich App 576; 601 NW 2d 141(1999) 12
Cardinal Mooney High School v Michigan High School Athletic Assn, 437 Mich 75, 80; 467 NW 2d 21 (1991) 6
Cedar Rapids Community School District v City if Cedar Rapids, 252 Iowa 205; 106 NW2d 655(1960) 31, 32
Central Advertising Co, v Michigan Dept of Transp 162 Mich App 701; 413 NW 2d 479 (1987) 15
Corder v City of Milford, 196 A 2d 406; 57 Del 150 (1963) 32
Dearden v Detroit, 403 Mich 256, 264; 269 NW2d 139 (1978) 7, 8, 35
Edmonds School District No 15 v City of Mountlake Terrace, 77 Wash 2d 609; 465 P2d 177 ... 31
Franges v. General Motors, 404 Mich 590, 612; 274 NW 2d 392(1979) 28
Gardner-White Co. v. State Board, 296 Mich 225, 230;295 NW 2d 624(1941) 28
Hitchman v. Oakland Township, 329 Mich 331; 45 NW2d 306 (1951) 11
Kent County Aeronautics Board v. Department of State Police, 239 Mich App 563; 609 NW2d 593 (2000) 16
Magreta v Ambassador Steel Co, 380 Mich 513;158 NW 2d 473 (1968) 18
Paul v Lee, 455 Mich 204, 210; 568 NW 2d 510 (1997) 6
Philadelphia v Zoning Board, 417 Pa 277; 207 A 2d 864 (1965) 33
Port Arthur Independent School District v City of Groves, 376 SW 2d 330 (Tex 1964) 31
Radloff v State, 116 Mich App 745, 757-58; 323 NW2d 541 (1982) 30
Randall v Meridian Twp., 342 Mich 605, 607; 70 NW2d 728 (1955) 34
Satterly v Flint, 373 Mich 102, 111; 128 NW2d 508 (1964) 16
School District of Philadelphia v Zoning Board of Adjustment, 417 Pa 277; 207 A2d 864(1965) 31
U.S. v Wade, 181 F Supp 2d 715 (Ed Mich 2002) 15
United States Fidelity v Amerisure Insurance Co, 195 Mich App 1, 6; 489 NW 2d 115 (1992) .. 12
Village of Euclid v. Ambler Realty Company, 272 US 365, 47 S Ct, 114, 118; 71 L Ed 303 (1928) 11
Webster v Secretary of State, 147 Mich App762, 767; 382 NW 2d 745 (1985) 18
Westervelt v Natural Resources Commission, 402 Mich 12; 263 NW 2d 564 (1978) 39
Young v Groenendal, 10 Mich App 112, 116; 159 NW 2d 158 (1968) 10

Statutes

MCL 125.327(1) (a) 11
MCL 125.1502(m) 14
MCL 125.1508(a) 13
MCL 125.286(e)(1) 15
MCL 125.290 34
MCL 125.294 10
MCL 125.321 ..... 8, 9
MCL 125.581 8
MCL 259.801 12
MCL 380.1 ..... 7, 8

MCL 380.1263(3) 1, 7
MCL 388.851 ..... 1, 2, 8, 12, 13
MCL 791.201 8
MCL 791.216 36
MCL 791.217 36
MCL 791.220 36
MCL125.273 10
MCLA 125.1510(1) 15

Other Authorities

Hagman & Juergensmeyer, Urban Planning and Land Development Control Law, (Practitioner's Edition, 1986), p. 240 14

Rules

MCR 2.116(C)(10) 6

Treatises

Rathkopf The Law of Zoning and Planning, Section 1.01 page 1-15 10

Constitutional Provisions

Const 1963, art 7, § 34 9

STATEMENT OF JUDGMENT APPEALED FROM

This is an Appeal from Case No. 219124, Schulz v. Northville Public Schools, 247 Mich App 178; 635 NW2d 508 (2001) published on August 17, 2001. The Plaintiffs/Appellants are seeking the reversal of the Court of Appeals decision and a remand to the Circuit Court for determination of an equitable remedy for the injury that the Appellees have caused the Appellants.

QUESTIONS PRESENTED

I. DID THE LEGISLATURE INTEND IN MCL 380.1263(3) TO IMMUNIZE SCHOOL DISTRICTS FROM THE APPLICATION OF LOCAL LAND DEVELOPMENT REGULATIONS MEANT TO INSURE APPROPRIATE LAND USE RELATIONSHIPS AND PROTECT PUBLIC HEALTH, SAFETY AND WELFARE IN THE ABSENCE OF ANY STATE MANDATED LAND DEVELOPMENT CONTROLS AND IN THE ABSENCE OF ANY STATE REVIEW OF SCHOOL SITE PLANS FOR ADHERENCE TO REASONABLE LAND DEVELOPMENT STANDARDS?

THE PLAINTIFFS/APPELLANTS ANSWER "NO"
THE COURT OF APPEALS ANSWERS "YES"
THE DEFENDANT/APPELLEE PRESUMABLY ANSWERS "YES"

II. IS MCL 380.1263(3) UNCONSTITUTIONAL AS IT DELEGATES UNBRIDLED AUTHORITY TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION TO APPROVE SITE PLANS FOR SCHOOL BUILDINGS THAT IMPACT CITIZENS' PROTECTED PROPERTY RIGHTS ABSENT ANY GUIDELINE FOR THE EXERCISE OF THE SUPERINTENDENT'S DISCRETION TO APPROVE SUCH SITE PLANS

THE PLAINTIFFS/APPELLANTS ANSWER "YES"
THE COURT OF APPEALS ANSWERS "NO"
THE DEFENDANT/APPELLEE PRESUMABLY ANSWERS "NO"

INTRODUCTION

In 1990, the legislature added MCL 380.1263(3) to the Revised School Code. This section provides in relevant part that the Superintendent of Public Instruction has the sole and exclusive jurisdiction to review and approve site plans for school buildings, which must be designed and constructed in compliance with the Construction of School Buildings Act, MCL 388.851 ("CSBA"). The Court of Appeals' erroneous decision in this matter is likely to have far reaching and deleterious consequences throughout the state. Although the court claimed that it was merely applying the plain text of §1263(3), the court instead implied a clearly erroneous meaning from the text which leads to an unfair and absurd result.

The School District claims that the legislature intended through the grant of exclusive jurisdiction to immunize schools from the application of **any** land use controls to govern the development of school sites. Neither the language of the statute, its legislative history, nor the interpretation of the statute applied by the agencies charged with its implementation supports the School District's sweeping and erroneous interpretation that the court affirmed. Absent the application of local land use standards to the development of school sites, there is no regulation of school site development. The legislature could not have intended the absurd result that school sites remain unregulated in their impact on adjacent land and consequently free to damage and interfere with the use and enjoyment of adjacent property at the school district's whim. If this Court agrees with the court of appeals that the legislature intended to give the Superintendent free reign over the development of school sites absent the application of any land development standards, then this Court would have to find that §1263(3) is an

unconstitutional delegation of legislative power and violates the Homeowners' due process rights.

In order to avoid declaring §1263(3) unconstitutional, this Court can conclude that, at most, the legislature intended to give the Superintendent sole and exclusive jurisdiction to review school site plans to ensure that they conform with the provisions of the Construction of School Buildings Act, MCL 388.851, et seq ("CSBA"). Since however the CSBA has no site design standards and the Superintendent has taken no action either to adopt site design standards or to displace the local review of site plans for issues not covered by the CSBA, there must be some oversight of school site design and the local unit of government is the obvious choice for that job.

There can be no reasonable disagreement that schools must be subject to some reasonable land use regulation for the protection of public health, safety and welfare, adjacent property owners and the school's own populace, whether promulgated by the local government or the State Legislature.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Intervening Plaintiffs/Appellants Homeowners ("Homeowners") are all property owners and residents of Northville Township who reside in the Woods of Edenderry Subdivision ("Subdivision") located off Six Mile Road between Beck and Sheldon roads in Northville Township.

The Defendants/Appellees (hereafter "School" or "School District") have constructed a new High School (the "High School") located on 6 mile road between Beck and Sheldon roads in Northville Township. The High School is located, in part,

adjacent to the Woods of Edenderry Subdivision. Some of the Homeowners' yards abut the site on which the school now has been built.

On June 12, 1998, prior to the School District commencing construction of the school, the Township and Homeowners brought a motion to enjoin construction of the High School until the School District complied with the Township's land development regulations. The court denied the motion. On that same date, the court granted the Homeowners' motion to intervene in the lawsuit. The School District stipulated to the intervention. In their complaint, the Homeowners sought a declaratory ruling that the School District was subject to the Township's land development regulations.

During the course of these proceedings, the District constructed the High School. The District developed the approximately 48-acre school site with a 350,000 square school building. **(App 1A)**[1] The School District projects an eventual enrollment of 2200 students. **(App 5A)**. The site plan included an auditorium with seating for 1,000 persons and a parking lot containing 800 spaces.**(App 4A)** The plan also contained 10 tennis courts and several athletic fields including a soccer field and track area with bleacher seating for approximately 500 persons. **(App 3A, 4A).** The field is located approximately 10-20 feet from the Homeowners' backyards. **(App 7A, App 9A)** The zoning ordinance requires a 200 foot setback. **(App 10A)** The setback for the parking lot from adjacent property lines is short 30'. **(App 9A,10A)** The School plans to erect lights and a PA system in conjunction with the athletic fields near the property lines. **(App 5A)**

[1] All references to the record contained in the Appendix shall hereafter be abbreviated as " (App [page number]) ".

The Northville school site in comparison to other recently constructed schools contains significantly more square feet of building per acre of land. **(App 1A)** The Township's planner, Brad Strader, found that the site was over built and that the content of the School District's site plan failed to meet the minimum requirements of many of the Township's land development regulations. **(App 9A-12A, 14A)** These regulations included, in part, landscaping, tree preservation and replacement, parking, detention pond design, buffering, greenbelt, setback and berming. Id. The Township's engineer found that the School's storm water, paving and grading plans contained "a significant amount of deficiencies". **(App 18A-19A)** Strader also concluded in his first review of the site that the "proximity of the pond to on-site athletic facilities and adjacent residential homes would create an unsafe environment." **(App 21A).**

In response to the Township planning commission's, planner's and engineer's concerns with the School's plan, the School rejoined that it was not subject to the Township's land development ordinances. In a letter dated May 22, 1998, The Superintendent of the Northville Public School District, Leonard R. Rezmierski, informed the Township that: "the district ha[d] no intention of altering its site plan to either reduce the lighting program for the soccer stadium, reduce the number of parking spaces, reconfigure the site plan to increase the distance from the west boundary to the soccer stadium or reconfigure the detention basin to save the grove of trees located along the northern boundary." **(App 24A)**

Following the circuit court's denial of the Homeowners' motion for a preliminary injunction, the School District, as Rezmiersky indicated, clear cut the wooded area

located on the property that was a protected woodland under the Township's Woodland ordinance.

On July 22, 1998, the Wayne County Department of Environment, Land Resource Management Division, ordered the District to install a detention pond outlet and permanently stabilize the detention basin by August 1, 1998. **(App 25A)** The School District failed to honor the County's order. On August 6, 1998, the County issued a stop work order to the School after a heavy rainstorm caused the severe flooding of adjacent property owned by Homeowners Dan and Mary Beth Yakima. **(App 26A)(App 29A-30A)**

On November 2, 1998, the Homeowners filed a motion for summary disposition on their declaratory judgment action seeking a ruling that the School was subject to the Township's land use regulations. The Township also filed a motion for summary disposition. On January 22, 1999, the court denied the motions. The Homeowners and the Township separately appealed the court's decision to the Court of Appeals. In the interim, The Township and School agreed to settle their suit and dismiss the Township's appeal. The Township, therefore, is no longer a party to these proceedings. The Homeowners were not included in the School and Township's settlement discussions and took no part in that settlement. On information and belief, as part of the settlement, the School has agreed to make some changes to their site plan. The Township's settlement did not deal with the issues that were most important to the Intervening Plaintiffs and has not redressed their injury.

In a published opinion dated August 17, 2001, the Court of Appeals affirmed the lower court's decision. On October 30, 2002, this Court granted the Homeowners' delayed application for leave to appeal the Court of Appeal's clearly erroneous opinion.

STANDARD OF REVIEW

The Homeowners are appealing the court of appeals' affirmance of the circuit court's denial of a motion for summary disposition that the Homeowners brought pursuant to MCR 2.116 (C) (10). The Court reviews de novo the Court of Appeals' affirmance of the circuit court's grant or denial of a motion for summary disposition. Paul v Lee, 455 Mich 204, 210; 568 NW 2d 510 (1997)

> "When reviewing a motion for summary disposition based on MCR 2.116(C)(10) [the court] must review the documentary evidence and determine whether a genuine issue of material fact exists. [The court] draw[s] all reasonable inferences in the non-movant's favor, giving that party the benefit of any reasonable doubt. Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." Id.

In addition, the question whether the legislature intended to immunize the School from application of the Township's zoning ordinance is a question of law which the Court also reviews de novo Cardinal Mooney High School v Michigan High School Athletic Assn, 437 Mich 75, 80; 467 NW 2d 21 (1991). The question whether §1263(3) of the School Code is unconstitutional because it delegates unbridled authority to the Superintendent of Public Instruction, is also a question of law subject to de novo review.

ARGUMENT

I. THE COURT OF APPEALS CLEARLY ERRED IN ITS CONSTRUCTION OF THE REVISED SCHOOL CODE AS THE LEGISLATURE HAS EVIDENCED NO INTENT TO IMMUNIZE SCHOOL DISTRICTS FROM ADHERING TO LAND DEVELOPMENT CONTROLS MEANT TO INSURE APPROPRIATE LAND USE RELATIONSHIPS, AVOID THE INTERFERENCE WITH THE USE AND ENJOYMENT OF ADJACENT PROPERTY AND PROTECT PUBLIC HEALTH, SAFETY AND WELFARE

In 1990, the legislature amended the Revised School Code, MCL 380.1 et seq; MSA 15.4001 et seq in part to add subsection 3 to MCL 380.1263(3); MSA 15.41263 ("School Code").

Section 1263(3) provides:

> 3) The board of the School District shall not design or build a school building to be used for **instructional** or **non instructional** school purposes or design and implement the design for a school site unless the design and construction is in compliance with Act No. 306 of the Public Act of 1937, being §388.851 to 388.855(a) of the Michigan Compiled Laws. The Superintendent of Public Instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, and remodeling of school buildings used for instructional or non instructional school purposes and of site plans for those school buildings. **(App 31A)** (Emphasis added)

The School and lower courts claim that the statute's reference to the Superintendent of Public Instruction's ("Superintendent") exclusive jurisdiction to review and approve "site plans" evidences the legislative intent to preempt local land development regulation of school sites.

This Court held in Dearden v Detroit, 403 Mich 256, 264; 269 NW2d 139 (1978) that: "The legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances."

In Dearden, the City attempted to use its zoning ordinance to prohibit the use of property for a rehabilitation center. The Dearden Court held that it was necessary to review together the City and Village Zoning Enabling Act, MCL 125.581; MSA 5.2931, which is the source of the City's power to zone, and the Department of Corrections Act, MCL 791.201 et seq; MSA 28.2271 et seq, which is the source of the Department's power to establish penal institutions, to determine the legislature's intent. The Court found that the legislature had intended to give the Department of Corrections sole authority to determine locations for penal institutions. The Court, therefore, held that Detroit's zoning ordinance was "void to the extent that it attempts to prohibit the use of the subject property as a rehabilitation center." Id at 267. (Emphasis added).

. The various statutory provisions for review here to discern whether the legislature intended to immunize schools from local land use controls meant to promote public health, safety and welfare include: the Revised School Code, MCL 380.1 et seq; MSA 15.4001 et seq; the Regulation of Construction of School Buildings Act, MCL 388.851 et seq; MSA 15.1961 et seq; the Township Zoning Act, MCL 125.271 et seq; MSA 5.2963(1) ("TZA") and the Township Planning Act, MCL 125.321 et seq; MSA 5.2963 ("TPA"). In Burt Township v Department of Natural Resources, 459 Mich 659; 593 NW2d, 537 (1999), this Court considered the words that the legislature might use to express its intent to immunize another unit of government from the local government's zoning laws. The Court stated that:

> While the presence of such terms as "exclusive jurisdiction" certainly would be indicative of a legislative intent to immunize the DNR from local zoning ordinances, we decline to require that the Legislature use any particular talismanic words to indicate its intent. The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive. Whatever terms are actually employed by the

Legislature, our task is to examine the various statutory provisions at issue and attempt to discern the legislative intent in enacting them. Id at 669.

In this case, the court of appeals failed to analyze the relevant Acts as a whole to determine legislative intent. The court instead was blinded by the talismanic power of the phrase "sole and exclusive jurisdiction", which caused it to misapprehend the subject matter of the Superintendent's "sole and exclusive jurisdiction". The court mistakenly enlarged the scope or subject matter of the Superintendent's jurisdiction in a manner not supported by the text of §1263(3). The court erroneously equated the Superintendent's exclusive jurisdiction to review and approve site plans for school construction, with exempting school construction from all land development regulation meant to protect public health, safety and welfare.

A. Neither The Township Zoning Act Nor The Township Planning Act Evidence An Intent To Immunize School Development From Appropriate Land Use Regulation But Instead Authorize Townships To Plan And Zone For School Uses

The legislature has enacted zoning and land planning enabling acts to give local units of government the power to manage and regulate the use of land within that unit's jurisdiction. In Burt Township, supra, this Court held that the Township Zoning Act, MCL 125.271 et seq; MSA 5.2963 (1)("TZA"), along with the Township Planning Act, MCL Section 125.321 et seq; MSA 5.2963.101 (1), ("TPA") provide Townships "with extensive authority to regulate the use and development of land within their borders" Id 665-666 Additionally, the Const 1963, art 7, § 34 provides that: "The provisions of this Constitution and law concerning ... Townships ... shall be liberally construed in their favor. Powers

granted to ... Townships by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution."

The earliest zoning ordinances were an effort to legislatively declare certain uses of land in particular places as nuisances and thereby relieve property owners from having to prove a nuisance per se or in fact. 1 Rathkopf The Law of Zoning and Planning, §1.01 pages 1-15. A nuisance is an activity or use of land that unreasonably interferes with another owner's use and enjoyment of his or her property. Young v Groenendal, 10 Mich App 112, 116; 159 NW 2d 158 (1968) Under Michigan law, the violation of a zoning ordinance is a nuisance per se, subject to abatement by the courts. MCL 125.294. The legislature, therefore, has determined that any use of land in contravention to a local zoning ordinance interferes with the use and enjoyment of land as a matter of law.

The purpose of zoning ordinances is to "limit the improper use of land, to insure that uses of land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lessen congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, **education**, recreation, and other public requirements." MCL 125.273 (Emphasis Added) The TZA also broadly authorizes a township to achieve the purposes of the zoning ordinance by implementing land use regulations which "designat[e] or limit[] the location, the height, number of stories and size of dwellings, buildings and structures that may be erected, altered, . . . the area of yards, courts, and other open spaces. MCL 125.271

A municipality may only enact and apply zoning ordinances that substantially further the protection of the public health safety and welfare. Hitchman v. Oakland Township, 329 Mich 331; 45 NW2d 306 (1951), citing Village of Euclid v. Ambler Realty Company, 272 US 365; 47 S Ct 114, 118; 71 L Ed 303 (1928). (Zoning ordinances "must find their justification in some aspect of the police power, asserted by the public welfare.") It should be self evident that the purpose of land development controls such as setbacks, height restrictions, density restrictions, noise ordinances, natural resource preservation ordinances, landscaping, buffering, lighting restrictions, traffic circulation and storm water management is to insure that uses of land are situated in appropriate relationships in furtherance of the public health, safety and welfare.

The legislature while providing townships with broad authority to regulate land use has evidenced no intent to exclude schools from adherence to local land development regulations. The TZA contains no prohibition against regulating the physical development of a school site. The Act's only reference to education is for townships to facilitate adequate and efficient provisions for education. Similarly, the TPA provides that a Township's master plan should allocate land for schools. MCL 125.327(1) (a) The legislature would have had no reason to authorize townships to plan and zone for school development, if the legislature had intended to exempt the development of school sites from local zoning laws or master plans.

If the legislature had intended to preempt local land use regulation in the development of school sites, it could easily have inserted such a provision in the TZA. The TZA expressly preempts the local regulation of oil and gas wells. In Capital Region Airport Authority v Charter Township of De Witt, 236 Mich App 576; 601 NW 2d

141(1999), the court of appeals found that the Airport Authorities Act, MCL 259.801 et seq; MSA 10.380(1) et seq did not provide Airport Authorities with exclusive jurisdiction over airport property to develop non aeronautical land uses. The court found it noteworthy that while the TZA was silent with respect to airports, it provided explicit immunization for residential care facilities and oil and gas wells:

> [the TZA] nonetheless contains specific exemptions for uses such as oil and gas wells and licensed residential facilities... Under the maxim expressio unis est exclusio alterus," (the expression of one thing is the exclusion of another), this court has stated that the express mention of one thing in a statute implies the exclusion of other similar things. United States Fidelity v Amerisure Insurance Co, 195 Mich App 1, 6; 489 NW 2d 115 (1992). **Thus, by making express exemptions in the TZA for wells and residential facilities, the legislature precluded a finding of implicit exemptions for other land uses. In the words of the Burt Twp Court `The legislature has demonstrated that it was aware of overriding land-use issues that warranted specific exemption from local regulation but provided no such exemption for the DNR's activities**. This act provides additional assurance that there was no legislative intent to exempt the **DNR** here' .... Likewise, we find no legislative intent to exempt airports in the TZA." Id at 594-95 (emphasis added)

The TZA and TPA demonstrate, therefore, that the legislature has failed to expressly exclude schools from local land development regulation, as it has done with other land uses, while explicitly authorizing townships to plan for and regulate land uses with schools as part of those plans and regulations.

B. The CSBA Has Not Replaced Local Control Over The Development Of School Sites But Only Local Control Over The Construction Of School Buildings

Section 1263(3) must be read in conjunction with the Regulation of Construction of School Buildings Act ("CSBA"), MCL 388.851 et seq; MSA 15.1961 et seq. Section

1263(3) explicitly states that school districts may not construct a school building or design a school site unless the plan and design complies with the CSBA.

Section 1 of the CSBA provides in relevant part that "No school building, public or private, or additions thereto, shall be erected, remodeled or reconstructed in the State except it be in conformity with the following provisions:"

> All plans and specifications for buildings shall be prepared by, and the construction supervised by, an architect or engineer who is registered in the State of Michigan. Before the construction, reconstruction, or remodeling of any school building or addition thereto is commenced, the written approval of the plans and specifications by the superintendent of public instruction or his authorized agent shall be obtained. The superintendent of public instruction or his authorized agent shall not issue such approval until he has secured in writing the approval of the state fire marshal, or the appropriate municipal official when certification as described in section 3 has been made, relative to factors concerning fire safety and of the health department having jurisdiction relative to factors affecting water supply, sanitation and food handling. MCL 388.851

The legislature enacted the CSBA to displace local building codes and the local control of the **construction** of school buildings. Significantly, the State Construction Code, MCL 125.1508(a); MSA 5.2949(8), which authorizes local government to adopt building codes, expressly provides that "[l]ocally adopted [building] codes do not apply to public or nonpublic schools within the governmental subdivision or without concurrence by the school authorities having jurisdiction." The State Construction Code is analogous to the State's Zoning Enabling Acts. The State Construction Code imparts authority to local governments to adopt building regulations, while the Zoning Enabling Acts provide local governments with the authority to promulgate zoning laws. Although the legislature mandated in the State Construction Act that local construction and building codes do not apply to school construction, the Zoning Enabling Acts, while

excluding other land uses from its purview, does not exempt Schools from local land development regulations. The legislature knew when it enacted §1263(3) that it had expressly exempted schools from local building codes, but that it had not expressly exempted schools from local zoning control.

The court of appeals erred in large part because it failed to distinguish between zoning ordinances and building codes. Making and understanding that distinction is crucial for discerning legislative intent in this matter.

> "[Building Codes] ... are not generally treated as land use control devices because **land use controls are focused on land and the relationship between buildings and land. Building** and housing **codes** generally **deal with matters of construction and maintenance, that is, with matters inward from the outside skin of a building**. Building codes are primarily derived from structural safety laws and are generally enforced against new construction." Hagman & Juergensmeyer, Urban Planning and Land Development Control Law, (Practitioner's Edition, 1986), p. 240 (Emphasis Added)

The authority of a local unit of government to regulate the construction and design of buildings and the design and planning of the building site stems from two different enabling statutes. Consequently, the construction and design of buildings are regulated by construction codes. The configuration of buildings and other structures on the land and the design of the site are regulated by zoning ordinances. Even if the court of appeals did not, the legislature understands the distinction between construction and zoning regulations. The State Construction Code emphasizes that **Construction regulation does not include a zoning ordinance or rule issued pursuant to a zoning ordinance and related to zoning."** MCL 125.1502(m); MSA 5.2949(2)

The difference between zoning and construction regulations is also illustrated in the way each statute uses the term "site plan".[2] The TZA defines "site plan" as including "the documents and drawings required by the zoning ordinance to insure that a proposed land use activity is in compliance with local ordinances and State and Federal statutes." MCL125.286(e)(1) In contrast, the State Construction Code requires only that an applicant seeking a building permit for the construction of a building submit a site plan, which "show[s] the dimensions, and the location of the proposed building or structure and other buildings or structures on the same premises. MCLA 125.1510(1) The respective site plan requirements under the building and zoning enabling acts illustrate that a site plan in the construction context is very different than a site plan in the zoning context regarding the information required, although site plans are required under both zoning and building ordinances to get building permit.

The CSBA's preemption of local building codes in the construction of schools, therefore, cannot be read as preempting local **land development regulation** of school sites.[3] The clear intent of the CSBA is only to supply an exclusive set of construction standards for school buildings.

C. The Revised School Code Read Together With The TZA, TPA and CSBA or Read Alone Has Not Displaced Local Land Development Regulation Of School Sites

---

[2] Those uses of the term "site plan "are instructive here as neither the CSBA nor the Revised School Code define the term "site plan" as used in §1263(3) It is appropriate to resort to external sources to aid in determining the legislature's intended meaning of the term as used in the Act. Central Advertising Co, v Michigan Dept of Transp 162 Mich App 701; 413 NW 2d 479 (1987) (citations omitted); U.S. v Wade, 181 F Supp 2d 715 (ED Mich 2002), (court referred to other statutory sections to find a definition for the term "peace officer").

[3] The School District has, in fact, conceded that the CSBA does not preempt local zoning ordinances. (Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Disposition, p.17.)

The Revised School Code is not a land use statute. Its purpose is to:

> Provide a system of public instruction and elementary and secondary schools; to revise, consolidate, and clarify the laws relating to elementary and secondary education; to provide for the organization, regulation, and maintenance of schools, school districts, public school academies, and intermediate school districts; to prescribe rights, powers, duties, and privileges of schools, school districts, public school academies, and intermediate school districts; to provide for the regulation of school teachers and certain other school employees; to provide for school elections and to prescribe powers and duties with respect thereto; to provide for the levy and collection of taxes; to provide for the borrowing of money and issuance of bonds and other evidences of indebtedness; to establish a fund and provide for expenditures from that fund; to provide for and prescribe the powers and duties of certain state departments, the state board of education, and certain other boards and officials; to provide for licensure of boarding schools; to prescribe penalties; and to repeal acts and parts of acts.

The first criterion in determining legislative intent is the specific language of the statute. The legislature is presumed to have intended the meaning that it plainly expressed. If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor appropriate. However, if reasonable minds can differ regarding the meaning of the statute, or if a literal construction of a statute would produce unreasonable and unjust results inconsistent with the purpose of the statute, then judicial construction is appropriate." Kent County Aeronautics Board v. Department of State Police, 239 Mich App 563; 609 NW2d 593 (2000), affirmed sub nom Byrne v. State, 463 Mich 652, 624 NW2d 906 (2001). This Court has held that determining whether the words of a statute are clear or unclear is judicial construction in itself. Satterly v Flint, 373 Mich 102, 111; 128 NW2d 508 (1964).

The text of §1263(3) is ambiguous and thus requires resort to extrinsic aids to discern the legislature's intent in drafting this section. Clarification is needed because

although the text requires that school buildings and sites must be constructed and designed in conformity with the CSBA, the CSBA has no site design standards or requirements. In Flint, supra, the Court concluded that the phrase "normal work week" and word "compensation" in a charter provision regarding wages for city employees, although seemingly clear on its face, needed clarification when applied to compensating firemen because such employees do not have a "normal work week". Similarly, although §1263(3) requires that school sites be designed in conformity with the CSBA, a plain reading of the CSBA demonstrates that the CSBA, like all construction codes, has no site design requirements or standards. The phrase, therefore, "design and implement the design for a school site" needs clarification since the CSBA has no site design requirements. Moreover, it is difficult to square the Superintendent's authority over site plan review for the design of school buildings with the fact that the CSBA contains no site design requirements.

The Flint Court held that it could construe the meaning of the section through the "legislative history of what was intended in adopting the amendment, ... and by the actions of all concerned -- the city, its citizens, the firemen – over a period of more than eight years." Id at 113. These same interpretive aids should be used in this case.

First, according to the House Legislative Analysis of HB 5451(8-29-90) **(App32A-33A)** the impetus for §1263(3) arose when the Birmingham School District sought to build a bus garage and other non-instructional buildings at a school site. The issue was whether the CSBA or the State Construction Code governed the construction of non-instructional school buildings. There was no issue concerning whether new

construction of school buildings should be subject to local land development regulations. The Legislative Analysis of the bill provided that:

> The bill would clarify that this act (and not the state construction code act) would apply to `school buildings' that were not specifically meant for instructional purposes. Apparently, some recent judicial interpretations have indicated that school buildings such as these (for instance, a bus garage) are subject to local control. The bill specifies the final authority over school related construction plans would belong to the superintendent of public instruction. **(App 33A)**

Second, not only does the CSBA lack site design requirements or standards to dictate the elements needed in the preparation of a site plan and serve as the basis for approving or rejecting such a plan, but also since the enactment of §1263(3) in 1990, the Superintendent's agents have not reviewed site plans for site design issues. As demonstrated below, according to the agents, they do no such site plan review precisely because they have no rules or standards for such review and they do not believe that they have the jurisdiction to conduct such reviews. The Courts accord great deference to an agency's interpretation of a statute or rule that they execute. Webster v Secretary of State, 147 Mich App762, 767; 382 NW 2d 745 (1985) citing Magreta v Ambassador Steel Co, 380 Mich 513;158 NW 2d 473 (1968); Board of Education v Owosso, 208 Mich 646; 175 NW 1009 (1920) (Court will give weight and defer to the practical construction of statutes by those agencies implementing them if consistent with purpose of legislation)

Although § 1263(3) ostensibly gives the Superintendent the sole and exclusive jurisdiction to review and approve construction plans and site plans for school buildings, the Superintendent plays merely a ministerial role in the school construction process. Through an interdepartmental agreement, the school construction review and approval

process is conducted on behalf of the Superintendent by the Department of Consumer and Industry Services ("CIS") Bureau of the State Fire Marshall ("Fire Marshal"') and the Bureau of Construction Codes ("Bureau") along with local county health departments. The Department of Education has an agreement with the Bureau, to review school building plans and specifications for compliance with barrier free design requirements. It also reviews electrical plans, conducts electrical inspections and investigates barrier free complaints. The Department of Education also has an agreement with the Fire Marshall to review the plans and specifications for construction, reconstruction, additions, or renovation of public schools, non public schools, community colleges and private colleges concerning fire safety. **(App 34A-37A).** The Fire Marshall issues the approvals to begin construction and to occupy a school building and notifies the Department of Education, which then provides official notification to the local school officials. **(App 38A- 42A**) The Superintendent cannot issue the notification to the school district without approval from the Fire Marshall. **(App 74A)**

Daniel Dykstra ("Dykstra"), the Assistant Deputy Director of the Office of Fire Safety, Consumer and Industry Services testified regarding the subject matter of his Bureau's jurisdiction over the review and approval of school site plans, which he conducts on behalf of the Superintendent. Dykstra first informed that his Bureau (the Fire Marshall) issues construction approval for schools based on his Bureau's review of the plans for fire safety, the Construction Code Bureau's review for electrical code compliance and barrier free design requirements and the relevant county health department's review for water sanitation and food handling compliance. **(App 45A-46A)**

Dykstra also testified concerning his understanding of the term "site plan" as used in Section 1263(3) and the fact that his Bureau conducts no review of the design of school sites. He stated:

A: Well, it's [site plan] a broad term. We have discussed the term before. And it could cover any number of things.

Q: And when you say we have discussed it before, are you talking about people within your Bureau?

A: Yes.

Q: And you said that it's a broad term that could mean a number of different things. What else have you discussed about it? ...

A: **We have discussed what it actually means as far as our responsibilities under the Act.**

Q: And what is it that you believe it means in terms of your responsibilities under the Act?

(Mr. Lusk) Objection to the extent it calls for a legal conclusion.

(Ms. Friedlaender) I'm not asking for a legal interpretation.

Question by Ms. Friedlaender, continuing

Q: Just in your bureau, what is your understanding?

(Mr. Lusk): Objection to the extent it calls for a legal conclusion.

A: **Our understanding of that term in this reference is that it means the same thing it would in a typical instructional school review that we review site plans to the extent that are covered in the School Fire Safety Rules** for things such as exiting from the building location, location of the building in relation to other facilities such as if there was a - - - or were a fuel storage facility next door, we would have concerns about that. **But again, its very limited in what our rules cover as far as site issues.**

Q: **Do you have rules that cover site issues?**

A: **No.** There are no rules in the fire safety regulations other than what I discussed; exiting requirements to a public way, for instance, which could be a parking lot, it could be a yard or a court or some kind. **There are very few site issues in the fire safety rules.**

Q: **Ok. And so when you review - - if this is right when you review a site plan, you are reviewing it in terms of whatever site provisions there are in the fire safety rules?**

A: **Correct.**

Q: **And nothing else?**

A: **Correct.**

(App 53A-54A) (Emphasis Added).

Dykstra's understanding of the term "site plan" as used in §1263(3) is similar to the type of site plan required under the State Construction Code. Dykstra clearly testified that his Bureau does not review site plans for site design issues governed by land use regulations and as understood in the zoning context.

Q: And does your bureau have any rules or regulations that you refer to determine whether that set back meets any particular standard?

(Mr. Butler) Objection. Asked and answered.

A: Our bureau does not.

(Question by Ms. Friedlaender continuing)

Q: Ok. The site plans you review, will they ever typically show landscaping?

A: Many times they do.

Q: And are you reviewing the plans to determine whether the landscaping meets any particular standard or rule for landscaping on a site?

(Mr. Butler): Objection. Asked and answered.

A: Our bureau does not.

(Questions by Ms. Friedlaender continuing)

Q: Ok your bureau has no standards for reviewing landscaping, true?

A: Correct.

Q: Will the plans ever show a buffering, any kind of buffering between the school site and adjacent properties?

A: Sometimes they might.

Q: And do you have any rules or standards for judging whether the buffering is adequate?

A: When you say buffering, I guess I need a definition of that.

Q: Buffering could be either the use of foliage or tress or landscaping or it could be a berm.

A: No. We would have no regulations.

Q: Or no standards?

A: Correct

Q: Do you require in your review process an approval process that the school preserve trees or other natural features of the site?

(Mr. Butler) Objection. Asked and answered.

A: We have no regulations for preserving trees.

(Question by Ms. Friedlaender, continuing)

Q: Ok. So you don't make that any of your business?

A: Correct.

Q: I already asked you about drainage. Does your department have any - rules or regulations with respect to the design of detention ponds or retention ponds.

A: Our office does not.

Q: And so, when you review a site plan, you're not reviewing a site plan to determine whether if there is a detention pond on the site plan that it meets any particular standards.

(Mr. Butler) Objection. Asked and answered.

(Ms. Friedlaender) You can answer.

A: Correct. We do not.

Q:(BY MS. FRIEDLAENDER, CONTINUING) Do the architects sometimes on the site plan that they submit to you that you review do they show parking lots with parking spaces?

A: Many times.

Q: And is it true that you department would have no rules or regulations to determine what are the appropriate amount of parking spaces?

MR. BUTLER: Objection. Asked and answered.

THE DEPONENT: My bureau does not.

MS. FRIEDLAENDER: Your bureau. I'm sorry.

Q:(BY MS. FRIEDLAENDER, CONTINUING) Will the site plan sometimes typically show internal traffic circulation?

A: Typically.

Q: And when you're reviewing a site plan, you don't have any standards or guidelines or rules to determine whether the site circulation is adequate, do you?

A: No. However, we do look at it from the aspect of - -

Q: Fire trucks.

A: - -fire department access,

Q: Right.

A: That is one of the issues we do look at.

Q: So do you review site circulation to determine whether a fire truck would be able to access that?

A: Just a cursory review to see about access by fire department agency.

Q: Okay. Do you look at the issues like building height?

A: Only to the extent they're required by our fire safety rules.

Q: And do some of your fire safety rules relate to minimum building heights or maximum building heights?

A: Based on construction type of the building, there are limits to the number of stories a building can be built.

Q: Okay.

A: For instance, a wood frame building, there are limits to how tall you can build a wood frame building. **So it's based wholly on construction**.

Q: And your concern with the height of the building is related to the fire safety of the building?

A: Well, I can't speak for the intent of the rules.
That would be one of those concerns I'm sure.

Q: Right. That's your understanding. Is that your understanding of the rules?

A:That would be one of the concerns.

Q: When you review a site plan, are you looking at it to determine whether the site design contains adequate open space?

A: Our rules don't address it. So, no.

Q: When you review site plans, do you have any regulations or standards as part of your rules in terms of lighting on the site? Like the height of lighting or its brightness, its incandescence?

A: No.

Q: Your review of the site plan, does it relate at all to - - do you look at all - - any issues about noise or potential noise impact from the site?

MR. BUTLER: Objection. Asked and answered.

THE DEPONENT: No.

Q: BY MS. FRIEDLAENDER, CONTINUING) You don't have any standards that cover that in your site plan review?

A: Correct.

Q: Is your site plan review that you conduct concerned in any way with the impact of the design of the school site on adjacent property?

A: The concern we would have again would be to adjacent facilities. Whether it's a hazard to the school building such as the bulk storage plant that I mentioned, we would be concerned about proximity in relation to what's around the school facility.

Q: Terms of it causing conflagration at the school facility?

A: Correct. Because the school facility is the one we have authority over.

Q: Are you concerned at all with how the school facility impacts adjacent property?

A: Am I concerned about - -

Q: Yes.

A: - - or do the rules address it?

Q: Do the rules address that?

A: The rules don't address that.

Q: And your site plan review does not address that, true?

A: Correct.

Q: As far as you know, in the plan review process in the state in your bureau - - and I can understand if you don't know what goes on in other bureaus. Okay. I'm just asking about your bureau and if you know about the other bureaus .Is there any bureau in the state within the state government and within your knowledge that deals with any of the list of issues I just went through on what would be in a site plan review?

A: I have no knowledge of any.

Q: Okay. As far as you know, do those items basically go unreviewed?

MR. BUTLER: Objection.

MR. LUSK: Objection. Foundation

MS. FRIEDLAENDER: I'm asking if he has any knowledge about that?

THE DEPONENT: I have no knowledge.

MS. FRIEDLAENDER: You have no idea. Okay.
(Dykstra Dep TR 49-56)

The Homeowners also took the deposition of Irvin Poke, Chief of the Plan Review Division of the Bureau of Construction Codes. Mr. Poke's education and training is as an architect. **(App 64A)** Poke's Bureau, as stated, reviews plans for compliance with barrier free design rules. **(App 66A)** His Bureau also conducts electrical reviews. **(Id)** The Bureau will also conduct plumbing and mechanical reviews upon request. **(Id)**

Poke testified that the "textbook site plan" usually contains the depiction of items such as site circulation, open spaces, building size, building height, drainage, landscaping, and buffering. He also affirmed, however, that his Bureau does not review any of those "text book" site plan requirements other than how they may impact the barrier free design of the site. **(App 71A)** For example, Poke testified that his Bureau has no authority to require any parking spaces on a plan but that if parking spaces are provided his Bureau will review the plan to ensure that it has the proper amount of handicap accessible spaces. **(App 70A)** His Bureau also only reviews plans for traffic circulation in relationship to barrier free issues. **(Id)** Poke affirmed that he was not reviewing plans for their impact on adjacent property **(App 69A [TR27-28]).** Indeed, Poke exhorted several times that his Bureau had no authority to review school site plans for anything other than compliance with barrier free design rules. **(App 69 A [TR 27, line 19;TR 28, line 24]) (70A [TR31, lines 1-25])**

Significantly, therefore, the agencies that are charged with implementing §1263(3) perceive the subject matter of their jurisdiction as very limited. Consistent with the Intergovernmental Agreements under which the Superintendent delegated its delegated authority to the Agencies, the Agencies are not reviewing site design. The Agencies have only agreed to, and the Intergovernmental Agreements only require that

the Agencies, review the plans and specifications for the construction, reconstruction, renovation or additions to school buildings and that is the extent of their review.

D. A Proper Construction Of §1263(3) Does Not Support The Court's Conclusion That The Legislature Has Evidenced An Intent To Exempt Schools From All Zoning Regulations

Contrary to its opinion, the court of appeals did not apply the plain text of §1263(3). The court instead implied from the statute's language that schools were exempt from following local land development regulations. There is, however, no textual basis for equating jurisdiction to review and approve site plans consistent with the CSBA with immunity from all land use controls and zoning ordinances. The text of 1263(3) has no language that explicitly exempts schools from adhering to reasonable land use regulations. At most, the legislature only intended, consistent with existing law, that the Superintendent have sole and exclusive jurisdiction over all construction and site issues, as minimal as they are, that are covered by the CSBA. The specific reference to the CSBA in the first sentence of 1263(3) modifies the scope of the jurisdiction granted to the Superintendent in the second sentence. The intent of Section 1263(3) is to ensure that school buildings and sites are constructed and designed in compliance with the CSBA. The intent is also to clarify that all school buildings on a school site whether used for instructional purposes or not are regulated by the CSBA. The fact that §1263(3) requires that a site plan contain information to show compliance with the CSBA, does not imply that the site plan need not contain any other information to show compliance with other regulations meant to promote public health, safety and welfare. At most, the legislature intended to insure that the Superintendent have the

sole and exclusive jurisdiction to review plans for adherence to the CSBA because that is within its expertise and has been within the Superintendent's jurisdiction since the enactment of the CSBA in 1937. It does not, however, foreclose local review over site plans for compliance with land development regulations not covered by the CSBA, but essential to the orderly development of land.

E. The Court Of Appeal's Mistaken Reading Of §1263(3) Leads To The Absurd And Prejudicial Result That School Districts Need Not Adhere To Any Land Use Regulations Meant To Protect Public Health Safety And Welfare In The Development Of School Sites

It is a rule of statutory interpretation that Michigan courts will not construe statutes in a manner that causes absurdity, hardship, injustice or prejudice to the public interest. Franges v. General Motors, 404 Mich 590, 612; 274 NW 2d 392(1979) "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience and to oppose all prejudice to public interest." (Citations)(Omitted) Gardner-White Co. v. State Board, 296 Mich 225, 230;295 NW 2d 624(1941).

As shown, the CSBA only replaces local **building** codes. It does not now, and never has, replaced **zoning** codes or regulations. As also previously shown, a building code is distinct from a zoning code. Moreover, as the agencies charged with the implementation of the CSBA have confirmed, the CSBA and related regulations have virtually no rules or guidelines for site design. These agencies also confirm that they have no jurisdiction to review site plans for any information other than the information that is covered by their rules.

The purpose of zoning law is to regulate the use of land for the public's benefit. The court's erroneous reading of §1263(3) wields a blow to the legitimacy of zoning laws. The opinion sends a message that the legislature must not regard land development regulations as essential to promoting public health, safety and welfare. If it did, it could not legitimately excuse schools from developing land, absent any such regulations. There are many school sites that will be developed throughout the state. These sites will impact many private homes and other land uses, roads, traffic patterns, sanitary sewers, storm sewers, drainage, natural resources, wetlands, water courses, wells and facets of the environment. If land development regulations are necessary to promote public health, safety and welfare, school construction projects like any other land development project must have some accountability to neighboring property owners and the community in which they exist.

There is no possible reason or policy to excuse schools from having to adhere to land development standards meant to insure the compatibility of land uses. If the legislature intended to immunize schools from local land use regulation, it is absurd to believe that the legislature would leave schools completely unregulated in their impact on adjacent uses and the community in general. Schools are usually located in residential neighborhoods. This Court should be able to take judicial notice that a 350,000 square foot school building with a potential enrollment of 2200 students, along with playing fields, bleachers, lights, noise and traffic, will have a pronounced impact on the adjoining residential neighborhood. A High School is a use very different than the typical single family dwelling. In this situation, the potentially disturbing impacts of the

school site can be ameliorated through land development regulations that require buffers, landscaping, setbacks, lighting controls, noise controls and the like.

This Court has held numerous times that it presumes that a zoning ordinance is valid, which means that there is a presumption that the ordinance furthers the public health, safety and welfare. There should also be a presumption, therefore, that any rule which excuses school construction from adhering to any land development regulations must pose a detriment to public, health safety and welfare. If the violation of a zoning regulation is, as a matter of law, a nuisance per se, the violation of a zoning ordinance must be a nuisance regardless of the identity of the violator. Moreover, a nuisance per se is nuisance under all circumstances and in any location. Radloff v State, 116 Mich App 745, 757-58; 323 NW2d 541 (1982) Under the court's interpretation, therefore, the legislature has not only exempted schools from land use regulation, but also has given school districts a license to maintain a nuisance per se, immune from judicial abatement. There is no way to reconcile the purpose of land use regulation and the violation of a zoning ordinance as a nuisance per se with the court's flawed interpretation of the Revised School Code. There is nothing in the Revised School Code nor in the Michigan Constitution which evidences an intent that promotion of education must include total disregard for the rights of neighboring property owners.

1. It Is Absurd And Detrimental To The Public Good To Conclude That The Legislature By Its Failure To Include Site Design Standards In §1263(3) Meant To Exempt Schools From Any Land Use Regulation

If the legislature had intended to give the Superintendent complete jurisdiction over the design of school sites to the exclusion of all local land development regulations, it is absurd to conclude that the legislature intended to leave school sites

completely unregulated. The Superintendent's agents have confirmed that they do not have requirements for site design and do not review site plans for adherence to any land development regulations or standards. For example Dykstra testified that no agency reviews school site plans to determine if the site meets requirements for site drainage, which can have a serious impact on neighboring property and public ways. If as the School District contends that schools are not subject to local land development regulation and the Superintendent has no land development regulations, then schools are being developed without any rules governing the design and implementation of the design of school sites and absent any oversight of important land use issues that can have a hugely detrimental impact on neighboring property.

In case after case, the Supreme Courts from many jurisdictions have held in extremely similar situations that their legislatures did not intend to preempt local police power regulation of schools and thus leave schools unregulated when as here the state had failed to provide an alternate set of standards, guidelines or rules to protect public health, safety and welfare.[4] Although several of these cases concern building or construction codes rather than zoning codes, this is a difference without distinction. It does not change the analysis of whether the state intended to preempt local police power regulations meant to promote public health, safety and welfare when it failed to replace the allegedly preempted regulations with **an alternate set of state created rules to provide the same protections as the preempted regulations**.

[4] See eg Edmonds School District No 15 v City of Mountlake Terrace, 77 Wash 2d 609; 465 P2d 177 (1970); School District of Philadelphia v Zoning Board of Adjustment, 417 Pa 277; 207 A2d 864(1965); Port Arthur Independent School District v City of Groves, 376 SW 2d 330 (Tex 1964) ; Cedar Rapids Community School District v City if Cedar Rapids, 252 Iowa 205; 106 NW2d 655(1960) These cases are in the Appendix.

Contrary to the court's opinion, these foreign cases are relevant and persuasive. The courts in these cases used the same statutory intent analysis that this Court employs in similar situations. The courts in these cases found that where the legislature may have intended to displace the application of local ordinances to school construction, but failed to implement an alternate set of ordinances, the statutes could not be interpreted as excusing schools from adhering to any regulation at all. In those situations, schools had to follow some regulation and it made sense for them to follow the regulations that applied in the municipality in which they were located. These cases recognize that the State has the power to promulgate and implement its own land use regulations, but that until it did, it would be absurd to interpret the statute empowering the school to develop sites and construct buildings to exempt that construction and development from general laws meant to protect public health, safety and welfare. For example, in Cedar Rapids Community School District v Cedar Rapids, 252 Iowa 205, 106 NW 2d 655 (1960), the legislature had granted the school district "exclusive jurisdiction" in all school matters. The school district, however, lacked standards for constructing school buildings, but still argued that it was not subject to the local construction code. The Court disagreed and held that the legislature had granted cities the power to enact standards for building construction and that "[t]he standard is set up in advance of the construction. We cannot believe that it was the intention of the legislature to leave such police matters without any prior standards having been fixed. We do not find any other method of providing a standard in these areas." Id at 210. **(App 84A)** In Corder v City of Milford, 196 A 2d 406; 57 Del 150 (1963), the court faced with the same problem as the Cedar court, and this Court, held that where the school

district had the authority to adopt a comprehensive building code, but had not, that the local regulations would apply "until displaced through more complete implementation by the educational authorities of their existing statutory authority." Id at 10 **(App 93A)** In Philadelphia v Zoning Board, 417 Pa 277; 207 A 2d 864 (1965), the school district claiming exclusive authority over construction of school buildings argued that it was immune from the City's parking regulation, although the legislature had not provided a comprehensive regulatory system for the construction of school buildings. The court held that:

> [W]e do not read legislative inaction in a field so intimately intertwined with the safety and health of children of this Commonwealth as is the regulation of school building construction to be a declaration of policy to the effect that school directors ... in districts of the first class shall be allowed a free hand to construct without regard to predetermined standards promulgated to protect the children over whom they have responsibility. This is especially true when we note that when the legislature desired to establish a fixed standard on its own initiative it did so by express terms [by promulgating fire safety standards for school construction].. "Id at 289 and n 10 (98 A) (Emphasis Added)

The same is true here. When the Michigan Legislature wanted to displace local building codes in the construction of school sites it enacted the CSBA. The legislature has not however enacted any code to serve as the standard for the development of a school site. The absence of state promulgated land development standards does not reveal an intent to give school districts carte blanch to develop land as they please.

2. Interpreting §1263(3) To Exempt Schools From All Land Use Regulation Would Violate The Due Process Rights Of Other Property Owners

Moreover, interpreting §1263(3) to provide the Superintendent with the authority to ignore local land use regulations when the State has undertaken no attempt to promulgate any land use controls for school development is problematical because it impinges the due process rights of adjacent property owners. The Michigan and US Constitutions protect private property rights against governmental intrusion. Zoning laws, because they do impact property rights, incorporate due process protections for landowners by providing published rules and standards that planning commissions must follow when approving and reviewing site plans for developments. As stated, these standards insure appropriate land use relationships. The property owner is secure in knowing that the site plan review process will ensure that the proposed plan is consistent with published and reasonable land development regulations. Moreover, site plan review and approval is conducted in public. The land use process is a public and open process because of the potential impact that land use decisions may have on protected property rights. Neighboring property owners can appear at such public hearings to voice concerns about site plans as they impact adjoining property and the community in general. They may be able to appeal certain administrative decisions to the local zoning board of appeal or the circuit court. See eg MCL 125.290; MSA 5.2963(2) (appeals to ZBA); MCL 125.293a; MSA 5.2963(23a) (appeal to circuit court from ZBA decision) The Michigan courts also have traditionally found that property owners have standing to challenge zoning decisions made with respect to neighboring property. Randall v Meridian Twp., 342 Mich 605, 607; 70 NW2d 728 (1955) (Plaintiff had standing to challenge zoning amendment because of possible adverse impact on Plaintiff's property from rezoning).

In contrast, under Section 1263(3), adjacent property owners receive no notice of site plan review of school buildings. The site plan review process contemplated under 1263(3) is not conducted in public. Mr. Dykstra and Mr. Poke, or their employees, review the site plans in the private confines of their Lansing offices. There are no published standards for site plan approval. There is no guaranteed opportunity to be heard. The entire school site plan approval process conflicts with the intent of zoning laws to keep these processes public and to afford a forum for those property owners affected by the process. The State obviously has no authority to deprive citizens of their property rights without due process for the sake of school development.

The lack of minimum due process protections distinguishes this case from other cases in which the Court has found legislative intent to immunize a governmental entity from zoning laws. In these other cases, the municipality was attempting to use its zoning power to exclude an essential but problematical land use. The controlling statute, however, as distinguished from this matter, contained substitute land use controls to ensure compatibility with adjacent property and due process protections for neighboring land owners.

For example, in Dearden, supra, the City was attempting to exclude a penal institution from locating at a particular site. The court found that the legislature intended to immunize the penal system from the use provisions of zoning ordinances. The legislation imbuing the Corrections Department with exclusive jurisdiction to develop penal institutions, however, did not leave that development unregulated. The Department of Corrections Act requires the Department to: develop a comprehensive plan for the development of rehabilitation sites; work closely with the local communities

in developing such sites; and provide public notice and a hearing prior to establishing a site. MCL 791.216; MSA 28.2286. The Act also contains setback and buffering standards. MCL 791.220 MSA 28.2290(6) Finally, the Act provides a private cause of action for citizens to enforce the statute if the Department is not abiding by the site selection process. MCL 791.217; MSA 28.2287.

Additionally, in Byrne, supra, the parties wanted to stop construction of State police radio towers. The court held that the legislature intended to immunize the state police from local zoning ordinances. The statute that governed the construction of radio towers, however, as in Dearden, contained substitute land use standards, The statute requires the director of the department of State Police to contact the local unit of government, notify them of their site selection and give the community a chance to recommend an alternate site or to provide a special land use permit for the selected site. The statute does not completely deprive the local government of any participation in the land development process. It also provides minimal due process protections. The state police act ensures by virtue of the special land use permit procedure that the local body will hold public hearings and the public will have some input.

In contrast, the Revised School Code contains no comprehensive or any plan for the uniform development of school sites. It contains no land use regulations, standards or guidelines for the development of school sites. It contains no requirement for notice or public hearings in connection with the review and approval of site plans for school buildings. It has no mechanism for protecting neighboring property owners from the negative impacts of the development Moreover, this case does not concern prohibiting school buildings from locating in appropriate locations. The issue is that

school districts in any chosen location need to have some accountability to adjacent property owners through proper land development, land planning and development regulations.

If the State is unable or unwilling to promulgate standards for school sites that take into consideration the impact on adjacent properties, then local land development regulations ought to apply. If the State does not want to spend the funds to train employees to review site plans for essential land use regulations and to perform more extensive site plan reviews, the answer is not to leave school sites totally unregulated. The answer is to share the burden with the local government, who has the expertise to review such plans. The Superintendent by failing to propose land use development rules and guidelines and perform full site plan review has either evidenced its understanding that its jurisdiction does not extend to such reviews or has declined to exercise such jurisdiction.

As shown, the Superintendent has not been reviewing site plans for compliance with land use controls. If the local bodies have no authority to review site plans for adherence to local land use controls, it leads to the absurd and prejudicial result that there is no oversight of new school site planning. This Court must assume that when the legislature amended the Revised School Code it knew that the relevant state agencies only performed a very limited review of site plans related to fire safety, barrier free design, electric code, water sanitation, food handling and sometimes plumbing and mechanical. The legislature also knew that no rules, regulations or guidelines existed for these agencies to review site plans for land development standards and reject those plans that failed to comport with such standards. In such a situation, the legislature

must have intended to maintain local review procedures in the absence of state review. Otherwise, there would be no review of school site plans to ensure that the development is not infringing on the property rights of others, endangering the occupants of the site, or otherwise threatening public health, safety and welfare.

Moreover, If the legislature had intended to insulate School Districts from the local zoning, it would have replaced those regulations with comparable safeguards, standards, regulations and rules. That is exactly what the legislature did when it preempted the application of local building codes to school construction. The legislature provided substitute regulations through the CSBA. The court is correct that the CSBA and its associated administrative rules have detailed standards for the construction of buildings, but that is not what is at issue. Here, however, the legislature has provided no rules or regulations for the preparation of site plans for school buildings other than the limited site issues

It would be absurd to conclude that by its omission to provide or require site design standards that the legislature intended that schools should have no obligation to adhere to any land use regulation, whether promulgated by the state or local government, to develop their sites in accordance with standards meant to protect public health, safety and welfare.

II. THE LACK OF ANY STANDARDS TO GUIDE THE SUPERINTENDENT'S DISCRETION TO REVIEW AND APPROVE SITE PLANS CONSTITUTES AN UNCONSTITUTIONAL AND UNLAWFUL DELEGATION OF LEGISLATIVE POWER

The Court of Appeals also erred in upholding the constitutionality of Section 1263(3). Section 1263(3) is unconstitutional to the extent that it purports to give the Superintendent sole and exclusive jurisdiction to approve the design of a school site absent any standards to guide the Superintendent in making that decision and absent any direction to the Superintendent to implement such standards.

The Legislature may not delegate its authority to executive agencies in the absence of discernible policies and standards to guide the agency's discretion in-carrying out legislative policy. In Westervelt v Natural Resources Commission, 402 Mich 12; 263 NW 2d 564 (1978) the court thoroughly analyzed the "delegation doctrine" and held that:

> [A] delegation of legislative power to an administrative agency is constitutionally valid when: (1) for purposes of satisfying the constitutional principle of 'separation of powers', the legislation in which power is delegated to an administrative agency expressly or by reference includes "standards... as reasonably precise as the subject matter of the legislation requires or permits"; and (2) for purposes of satisfying the Due Process Clause of our Constitution, safeguards, including "standards", exist, thereby assuring that the public will be protected against potential abuse of discretion at the hands of administrative officials; and if the "standards" afforded provide little or no actual due process protection, a court should in balance determine whether a totality of safeguards exist. " Id at 443

The facts are undisputed that Section 1263(3) contains no express or implicit land use development standards to guide the implementing agency's discretion in approving site plans for school buildings. It also contains no safeguards against arbitrary decisions or other due process protections. In Blue Cross Blue Shield v Milikin, 422 Mich 1, 50-55; 367 NW2d 1 (1985), the relevant statute delegated authority to the Insurance Commissioner to approve or disapprove risk factors proposed by health care corporations. The Court held that the legislature had unconstitutionally delegated its

power to the Insurance Commissioner because the relevant statute merely provided the Insurance Commissioner with the stark and open ended power to approve or disapprove the proposed "risk factors" without the guidance of any underlying policy or standard to make such a determination. Id at 53.

The relevant provision in the insurance code is indistinguishable from the language in the Revised School Code, which likewise gives the Superintendent the open ended and stark authority to review and approve site plans absent any standard, policy or guideline upon which to make the determination as it relates to site design issues.

The court of appeals was clearly wrong when it upheld the constitutionality of §1263(3) on the erroneous basis that the "CSBA provides the Superintendent with extremely detailed standards governing the design and construction of school buildings." Opinion, at p 188 **(App 115A)** The **design** and **construction** of school **buildings**, however, is not at issue. As explained, supra, the CSBA is a building code and a building code does not contain site design standards. Dykstra and Poke confirmed that the CSBA has virtually no site design requirements except for the minimal requirements that solely relate to fire safety and barrier free design.[5] Dykstra and Poke confirmed that they had no rules, guidelines or standards to review site plans for the type of information required by zoning ordinances. Poke strongly asserted more than once that his bureau had no jurisdiction to perform that kind of review. Dykstra and Poke are in charge of executing §1263(3) and as stated the Court should give great weight to their interpretation of §1263(3). Moreover, the Superintendent's designee

[5] Flint, supra, at 111 held that courts should be cognizant that statutory interpretation requires fact finding and that "[w]here available, the courts should never exclude relevant evidence on that issue of fact." Id.

admitted in a deposition that she had no idea whether any standards or guidelines existed for reviewing the site plans other than a 1975 publication that was no longer in use. **(App 75A, 76A, 77A-79A, 80A);(App 58A)**

Additionally, the state agencies empowered to review plans for the construction of school buildings also have not promulgated any land development standards and consequently do not review school site plans to ensure compatibility with adjacent land uses or the promotion of public health, safety and welfare. The land use controls incorporated in site plans are meant to ameliorate the impact of a use on surrounding properties and the community in general. Drainage and grading rules are essential to prevent flooding of nearby property and public ways, yet the Superintendent has no site plan requirements for drainage, storm water retention or site grading. Landscaping is important for aesthetics and buffering. The Superintendent has no site requirements for buffering the school from adjacent property or from protecting adjacent property from noise, glare from lights and other annoyances that interfere with the enjoyment of one's property. The Superintendent has no rules concerning how densely packed a site can be with buildings and other impervious surfaces. The Superintendent has no rules or oversight on whether the school's contractors are filling wetlands or harming the environment in any manner. The rules that the Agencies use to review site plans are not concerned with impact on surrounding property or any of the concerns normally found in land use regulations for the design of building sites.

Section 1263(3) is unconstitutional, therefore, because it delegates unbridled discretion to the Superintendent to review and approve site plans as they relate to the design of school sites without the guidance of any standards. Thus, the court

erred by failing to find that the statute is an unconstitutional delegation of legislative power.

CONCLUSION

Currently, there is no State agency reviewing school site plans to determine whether the site design meets any accepted standards of land development, while at the same time school districts claim to be immune from any such review at the local level. If zoning ordinances and land development regulations have any validity, which of course they do, then this lack of review is presumptively detrimental to public health, safety and welfare and cannot be tolerated. It is deplorable that in an area as important as land use and school construction no agency is reviewing whether school development plans adhere to basic standards intended to protect public health, safety and welfare, adjacent property owners, and the occupants of the school site. This Court must reverse the court of appeals to prevent the absurd and prejudicial finding that the legislature preempted local land development regulation of school sites without promulgating a separate set of comparable standards for school development. This Court must avoid the absurd result that schools have carte blanche to develop school sites absent any land use controls. Clearly, the failure of the legislature to provide alternate standards is the strongest proof that the legislature did not intend to exempt schools from adhering to any and all zoning regulations. Any other interpretation would violate the strong public policy found in the various zoning enabling acts to ensure the compatibility of land uses, promote land use planning and protect public health, safety and welfare. Any other interpretation requires this Court to find that the statute is unconstitutional for the legislature's failure to provide

the Superintendent with any discernible standard to review and approve site plans for the design of a school site.

RELIEF REQUESTED

The Appellants, respectfully request therefore that the Court reverse the decision of the Court of Appeals and remand this matter to the circuit court for further proceedings to provide the Appellants with an equitable remedy to relieve them of the injury that the School has caused by its interference with the Appellant's use and enjoyment of their respective properties.

Respectfully submitted,

Honigman Miller Schwartz and Cohn, LLC

SUSAN K. FRIEDLAENDER (P41873)
HONIGMAN MILLER SCHWARTZ and COHN, LLC
32270 Telegraph, Suite 225
Bingham Farms, MI 48025
(248) 566-8448 Office
(248) 566-8449 Fax

Dated: December 23, 2002

OAK_A\554956.1